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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD DIMATTEO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an adverse ruling on a defendant's motion in limine to restrict cross-examination of his proposed witness is reviewable on appeal if the defendant does not call the witness to testify at trial.

2. If so, whether the court of appeals erred in presuming, both as to the proponent of the witness and as to two co-defendants, that any error in the trial court's ruling was not harmless.

PARTIES TO THE PROCEEDING

In addition to Richard DiMatteo, respondents are Morris Kessler and James Suggs.

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UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD DIMATTEO, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 716 F.2d 1361.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 13a) was entered on October 11, 1983. A petition for rehearing was denied on December 19, 1983 (App., *infra*, 14a). On February 8, 1984, Justice Powell extended the time for filing a petition for a writ of certiorari to March 18, 1984 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, respondents Kessler and DiMatteo were convicted of conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Count One), conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count Three), and importation (Count Two) and possession of marijuana (Count Four), in violation of 21 U.S.C. 841(a)(1) and 952(a). Respondent Suggs was convicted of conspiracy to possess marijuana (Count Three), but was acquitted of possession of marijuana (Court Four). Kessler and DiMatteo were each sentenced to concurrent terms of 30 months' imprisonment on all counts, to be followed by concurrent special parole terms of three years. Suggs was sentenced to 18 months' imprisonment, suspended in favor of three years' probation. The court of appeals reversed.[1]

1. The evidence at trial, the sufficiency of which was not disputed on appeal, established that early in 1980 respondent Kessler contacted Jimmy Miller, an informant working with the Drug Enforcement Administration, about a possible drug smuggling scheme (Tr. 538-539). Miller agreed to meet Kessler, but he also notified the DEA (Tr. 539).

On April 3, 1980, Miller met with Kessler at the Fontainebleau Hotel in Miami Beach. With Miller was DEA Special Agent Charles Martinez. Miller introduced Martinez as "Carlos," a pilot with long experience flying drugs into the United States (Tr. 96-98). Kessler told Martinez that he and his "long time partner" Ricky (DiMatteo) were working with two groups

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[1] Other co-conspirators were convicted at an earlier trial. Their convictions were affirmed on appeal. *United States* v. *Varella*, 692 F.2d 1352 (11th Cir. 1982), cert. denied, No. 82-6845 (Oct. 3, 1983).

of Cubans and needed a pilot to help them fly marijuana out of Haiti and Colombia in a DC-6 (Tr. 99-100, 113). Martinez replied that he would not fly out of Colombia, but he agreed to assist Kessler and his co-conspirators in flying the marijuana from Haiti (Tr. 100-101). During this two-hour meeting (Tr. 107) Kessler repeatedly left Martinez to speak to "the Cubans" (later identified as co-conspirators Varella and Chinea) (Tr. 102-105, 327-328), returning to Martinez with details about the plane they were to use to transport 17,000 pounds of marijuana (Tr. 101-103) and what Martinez would be paid for his participation (Tr. 104). Martinez agreed to meet with Kessler again the next morning.

On April 4, Martinez again met with Kessler at the hotel. Kessler introduced Martinez to DiMatteo (Tr. 108-109, 328-329) and arranged a meeting for that afternoon in DiMatteo's hotel room at the Cricket Club, a private club in Miami Beach (Tr. 107-110).

DiMatteo's sponsor at the Cricket Club, Bobby Caldevilla, was present at the afternoon meeting. The co-conspirators discussed details of the planned marijuana importation, including the airplane, the procedures to be followed, and Martinez's payment. Martinez told DiMatteo he would need $75,000 "front money" out of the agreed total payment of $150,000. When DiMatteo demurred, he agreed to take only $50,000 (Tr. 116-117).

On April 9, Martinez met respondent Suggs and two others, who were "in charge of the off-loading operation" (Tr. 137-138). They arranged to meet the next morning at the proposed landing field in central Florida (Tr. 140). Early the next morning, Martinez flew in a chartered plane to a small airport in Leesburg, Florida, where he was met by Suggs (Tr. 141-144). Suggs then drove Martinez to the proposed landing site. He described the field's dimensions to Martinez, and said that even if the police were to learn that a plane had landed,

they would be able to unload the marijuana before the police could get to the landing site (Tr. 144-145). Suggs then drove Martinez back to the airport (Tr. 153-154).[2]

After several more meetings with other co-conspirators (Tr. 157-162) Martinez flew to Haiti on April 19, and the next day flew the loaded DC-6 to the landing site in central Florida (Tr. 163-167). Martinez and surveillance agents saw 10 to 15 people unload the cargo into waiting trucks and drive the loaded trucks away (Tr. 174-177). DEA agents followed three of the trucks, seized their contents—a large quantity of marijuana (Tr. 320-322)—and arrested several individuals. The main conspirators continued to meet, however, to discuss how and why they had lost their marijuana and how to recover their lost profits (Tr. 183-185). Martinez spoke frequently with Kessler over the next three weeks, reassuring him that they would receive their share of the marijuana money (Tr. 186).

2. During the government's direct case DiMatteo announced his intention to call Caldevilla as a defense witness (Tr. 244).[3] After the government rested DiMatteo reaffirmed his intention to call Caldevilla, as a witness on his behalf, to testify that at the April 4 Cricket Club meeting there had been no discussion of marijuana (Tr. 424). The government responded that if Caldevilla testified that the April 4 meeting concerned legitimate business, it would cross-examine him about subsequent drug discussions and transactions with Agent Martinez unrelated to the charges in this case (Tr. 425).

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[2] Martinez described Suggs' car as a big four-door green Chrysler (Tr. 144). A surveillance agent saw Martinez leave the Leesburg Airport in a green Chrysler bearing a license tag registered to Suggs (Tr. 322; GX 16).

[3] Caldevilla had originally been charged in the same indictment. The charges were dismissed after the district court found, in the *Varella* trial, that co-conspirator statements could not be used against him.

DiMatteo's attorney then made a proffer of Caldevilla's proposed testimony outside the presence of the jury. He said that Caldevilla would testify about "his relationship with Mr. DiMatteo and the fact that Mr. DiMatteo was a guest of Mr. Caldevilla's at the Cricket Club in early April of 1980, and that he was invited to come down here on business by Mr. Caldevilla related to an oil deal with Niger[i]a" (Tr. 428). The deal purportedly involved DiMatteo's brother, an electrical engineer in Pennsylvania (Tr. 428-429).

The government responded that Caldevilla's April 4 meeting with Kessler and DiMatteo concerned narcotics, not oil, and stated that Caldevilla had continued to meet with Agent Martinez and Kessler through July 28 to negotiate another marijuana deal (Tr. 431-432). Caldevilla had not yet been indicted for those subsequent activities, but an investigation was in progress (Tr. 432). The government proposed to cross-examine Caldevilla about his subsequent transaction to impeach his testimony about the April 4 meeting (Tr. 434). The prosecutor also stated that if Caldevilla claimed ignorance of the July marijuana meetings he would call Agent Martinez as a rebuttal witness (Tr. 435).

Concerned about requiring Caldevilla to assert his privilege against self-incrimination before the jury, the court allowed him to present a dry run of his proposed testimony out of the jury's presence and cautioned him on his Fifth Amendment privilege (Tr. 438-440). Caldevilla testified in the voir dire that he was present in the hotel room on April 4 and that he had heard no conversation about marijuana or drugs (Tr. 446-447, 455-456). He said that he and DiMatteo had discussed an oil deal involving DiMatteo and his brother (Tr. 453). After the voir dire the court tentatively ruled that the government could not question Caldevilla about his later marijuana transactions with Agent Martinez. The

court then recessed the trial overnight to permit the government to research the issue (Tr. 458).

The next morning the government again argued that Caldevilla's subsequent marijuana-related conversations and dealings with Agent Martinez were relevant to impeach his testimony that the April 4 meeting concerned only legitimate business dealings, since those contacts would have been inexplicable had Caldevilla not learned at the meeting of Martinez's apparent involvement in illicit drug trafficking (Tr. 472-476). The government accordingly contended that the impeachment evidence was not directed at Caldevilla's character (Tr. 465, 490-491), so that unless Caldevilla admitted the subsequent narcotics conversations with Agent Martinez, it was entitled to impeach him directly by putting on a rebuttal witness (Tr. 476-480). DiMatteo responded that Fed. R. Evid. 608 precluded the use of extrinsic evidence to prove Caldevilla's subsequent conduct (Tr. 481).

The district court reversed its earlier ruling (Tr. 493-496). Relying on Fed. R. Evid. 403, it held that because Caldevilla's testimony would directly conflict with Martinez's testimony about what happened at the April 4 meeting, the government's proffered cross-examination and rebuttal were material and relevant (Tr. 494). The court noted that admission of the evidence did not violate Fed. R. Evid. 608(b), since the government's proffered evidence was "not character evidence or evidence designed to address the character of the witness" (Tr. 494-495). Accordingly the court ruled that the government could cross-examine Caldevilla about the subsequent transactions, and if Caldevilla denied them or refused to answer the questions, could offer rebuttal testimony (Tr. 496).

After another voir dire of Caldevilla concerning his July 1980 discussions with Martinez, during which Caldevilla asserted his Fifth Amendment privilege (Tr.

497-498), DiMatteo chose not to call him as a defense witness before the jury (Tr. 511). DiMatteo then requested a continuance to secure the testimony of two other witnesses (whom he had not subpoenaed) who had attended the April 4 meeting and could—he said—testify along the same lines as Caldevilla. The district court, finding that DiMatteo had had several months to prepare for trial, denied his mid-trial request for a continuance (Tr. 512-513).

3. The court of appeals reversed. It first concluded that DiMatteo was entitled to seek review of the trial court's ruling in limine, even though he had never put Caldevilla on the stand and the arguably inadmissible evidence had never been introduced. "The trial court was clearly apprised of the disagreement with its ruling in the offer of proof, and that is the primary consideration in preservation of error" (App., *infra*, 5a).

The court held that both Kessler and Suggs were also entitled to review of the trial court's ruling. Kessler had not sought to put Caldevilla on the stand, but had objected to the government's proposed cross-examination and rebuttal since it would refer to later marijuana deals in which Kessler participated (Tr. 438, 487). That was sufficient, the court of appeals concluded, to entitle Kessler to seek reversal based on the district court's ruling.[4] Finally, the court found that Suggs should stand in the same position as his co-defendants, since he had "adopted" their objections (App., *infra*, 6a).[5]

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[4] The government had, however, agreed not to refer to Kessler's participation in the subsequent marijuana deal (Tr. 492-493).

[5] Suggs's only participation in the trial court discussion of this issue was the following (Tr. 487):

> THE COURT: Mr. Korchin, do you want to be heard?
>
> MR. KORCHIN: No, Judge, I don't think so. There is nothing I can add.

On the merits, the court of appeals held that the trial court would have erred in admitting the government's rebuttal evidence (Agent Martinez's testimony). It found that the drug-related meetings between Martinez and Caldevilla in July were specific acts of misconduct that would have been "admitted solely to attack the credibility of the witness," in violation of Fed. R. Evid. 608(b) (App., *infra*, 9a).

Finally, having concluded that respondents had all objected and that error would have been committed (had everything occurred according to the parties' proffers), the court rejected the contention that the error would have been harmless. The government argued that if Caldevilla had invoked his Fifth Amendment privilege before the jury, the trial court would have been within its discretion in striking Caldevilla's direct testimony. The defendants would thus derive no benefit from Caldevilla's testimony, no matter which way the trial court ruled (App., *infra*, 10a). The court of appeals responded that that argument was "based on an assumption about how the trial court would exercise its discretion. This case involves enough hypothetical scenarios without our adding to the tale" (*ibid.*). The court also did not consider, in its conclusion on harmless error, that DiMatteo could have subpoenaed other witnesses, but failed to do so.

REASONS FOR GRANTING THE PETITION

1. This case presents the question whether a criminal defendant may appeal an adverse ruling on his motion in limine to restrict cross-examination of a prospective witness when he does not thereafter call the witness to testify at trial. A closely related issue is presented in *Luce* v. *United States*, petition for cert. pending, No. 83-912: whether a defendant may appeal an adverse ruling on his motion in limine to restrict cross-examination about the defendant's prior conviction, when the defendant has declined to testify at trial. In light of the

disarray among the circuits on that issue,[6] we have taken the position that the petition for a writ of certiorari in *Luce* should be granted.[7]

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[6] The Sixth Circuit holds that a defendant who chooses not to testify may not appeal the court's preliminary ruling allowing introduction of the impeachment evidence. *United States* v. *Luce*, 713 F.2d 1236 (1983), petition for cert. pending, No. 83-912. The Ninth Circuit until recently took the same position. See *United States* v. *Fulton*, 549 F.2d 1325, 1327 (1977); *United States* v. *Murray*, 492 F.2d 178, 197 (1973), cert. denied, 419 U.S. 942 (1974); *United States* v. *Walters*, 477 F.2d 386, 389, cert. denied, 414 U.S. 1007 (1973).

The current Ninth Circuit rule, announced in *United States* v. *Cook*, 608 F.2d 1175 (1979) (en banc), cert. denied, 444 U.S. 1034 (1980), permits review when the defendant has announced an unequivocal intention to testify if the motion is granted, and has outlined the substance of his proposed testimony. See 608 F.2d at 1186 (opinion of Goodwin, J.); *id.* at 1188 (opinion of Wallace, J.); *id.* at 1196-1197 (opinion of Hufstedler, J.); *United States* v. *Portillo*, 633 F.2d 1313, 1321 (9th Cir. 1980), cert. denied, 450 U.S. 1043 (1981); *United States* v. *Hendershot*, 614 F.2d 648, 651-652 (9th Cir. 1980). Cf. *United States* v. *Halbert*, 668 F.2d 489, 491-494 (10th Cir.), cert. denied, 456 U.S. 934 (1982). The First, Fourth, Fifth, Seventh, and District of Columbia Circuits have held that review is available even if the defendant has not shown a firm intention to testify, or has not made clear the substance of his testimony. See *United States* v. *Kiendra*, 663 F.2d 349, 352 (1st Cir. 1981); *United States* v. *Whitehead*, 618 F.2d 523, 528 (4th Cir. 1980); *United States* v. *Toney*, 615 F.2d 277, 279 (5th Cir.), cert. denied, 449 U.S. 985 (1980); *United States* v. *Fountain*, 642 F.2d 1083, 1087 & n.3 (7th Cir.), cert. denied, 451 U.S. 993 (1981); *United States* v. *Lipscomb*, 702 F.2d 1049, 1069 (D.C. Cir. 1983) (en banc). Cf. *United States* v. *Hickey*, 596 F.2d 1082, 1087 (1st Cir. 1979). The Third Circuit has explicitly held that review is available, without addressing the question of the defendant's obligation to make a record. *United States* v. *Provenzano*, 620 F.2d 985, 1002 n.22, cert. denied, 449 U.S. 899 (1980). The Second Circuit has implicitly held that review is available, albeit without analyzing the issue. *United States* v. *Hayes*, 553 F.2d 824, 826-828, cert. denied, 434 U.S. 867 (1977); *United States* v. *Palumbo*, 401 F.2d 270 (1968), cert. denied, 394 U.S. 947 (1969).

[7] We have sent copies of our response to the petition in *Luce* to counsel for respondents.

The same reasons that support a holding of unreviewability in *Luce* dictate that result here. Even where there is a proffer of the witness's and the government's evidence, as there was here, there is not the firm record that testimony before the jury would have created, and that gives the issue on appeal a "concrete factual context." *New Jersey* v. *Portash*, 440 U.S. 450, 462 (1979) (Powell, J., concurring). More important, permitting appeal by a defendant who has never put his witness on the stand deprives the trial court of the opportunity to reconsider a possibly erroneous ruling, and the prosecution of the chance to reassess the need for its rebuttal evidence. It also allows defendants with no real intention of calling a witness to inject into the trial proceedings, at no risk to themselves, a potential ground for reversal. Because of these problems, a holding that the district court's preliminary ruling is reviewable may have no other consequence than to discourage the district courts from giving such rulings. 83-912 U.S. Br. 9-12.

2. We also argued in our brief in *Luce* that where the defendant's proffered testimony is not actually introduced at trial, it is difficult for the reviewing court to determine whether any error in the district court's ruling was harmless (83-912 U.S. Br. 10). In this case the court of appeals, after holding that the ruling in limine was reviewable, concluded that the district court had erred in ruling that it would permit the government to put on Agent Martinez's rebuttal testimony (App., *infra*, 6a-9a).[8] The court then refused to consider that

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[8] Though we have not presented the correctness of the evidentiary ruling as a separate question here, we note our strong disagreement with the court of appeals' resolution of that issue. The court improperly concluded that Martinez's testimony about later drug dealings with Caldevilla would have been offered "for the purpose of attacking * * * [Caldevilla's] credibility," in violation of Fed. R. Evid. 608(b). In fact, as the district court spe-

Caldevilla's testimony may have been stricken, and hence that the district court's error had been harmless (*id.* at 10a):

> We will not hold the error to be harmless based on an assumption about how the trial court would exercise its discretion. This case involves enough hypothetical scenarios without our adding to the tale.

The very difficulty of reviewing such "hypothetical scenarios," of course, is one of the principal reasons why the district court's ruling should be held unreviewable in the first place. Had Caldevilla actually testified the district court might, on his refusal to submit to cross-examination regarding later dealings with Martinez, have stricken Caldevilla's testimony. See, *e.g.*, *United States* v. *Panza*, 612 F.2d 432, 438-439 (9th Cir. 1979), cert. denied, 447 U.S. 925, 926 (1980); *United States* v. *Phillips*, 664 F.2d 971, 1027-1028 (5th Cir. 1981). But if DiMatteo could not have the benefit of Caldevilla's testimony regardless how the district court ruled on his motion in limine, it is hard to avoid concluding that the preliminary ruling—if erroneous—was harmless error.[9]

The court of appeals' refusal to consider the question of harmless error is still more difficult to explain as to

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cifically noted, Martinez's testimony was "not character evidence or evidence designed to address the character of the witness" (Tr. 494-495). Caldevilla's proposed direct testimony was that the April 4 meeting had not concerned marijuana. The government's rebuttal was designed to show that the subject of drug dealing must have been discussed, else Caldevilla would have had no occasion to solicit Martinez to engage in another marijuana deal only three months later.

[9] The court of appeals also did not address the fact that DiMatteo had failed to subpoena two other witnesses to the April 4 meeting. They presumably could have given the same account as Caldevilla (assuming it was true or that they were willing to perjure themselves), but would not have been open to Martinez's rebuttal.

respondents Kessler and Suggs. Suggs was not even present at the April 4 meeting (Tr. 496), so the district court's ruling could not possibly have harmed him. It was no doubt for that reason that his counsel took no part in the proceedings concerning Caldevilla's testimony and the government's rebuttal. See note 5, *supra*. Kessler, like Suggs, did not join DiMatteo in proposing Caldevilla as a witness (Tr. 438) ("we are not calling that witness"). And though he said in passing that Caldevilla's testimony might be of "some benefit" to him (Tr. 482), his only real interest was in making certain that the government's cross-examination and rebuttal did not enlighten the jury about his participation with Caldevilla in the later marijuana transactions (a subject the prosecution agreed to refrain from bringing up (see note 4, *supra*)). That interest was fully satisfied when DiMatteo decided not to put Caldevilla on the stand.

CONCLUSION

The Court should defer consideration of the petition for a writ of certiorari pending its decision on the petition in *Luce* v. *United States*, No. 83-912. It should then dispose of this petition as appropriate in light of that determination.

Respectfully submitted.

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MARCH 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT.

No. 81-6001

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RICHARD DIMATTEO, MORRIS KESSLER,
JAMES SUGGS, DEFENDANTS-APPELLANTS.

Appeals from the United States District
Court for the Southern District of Florida

OCT. 11, 1983.

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and GOLDBERG*, Senior Circuit Judge.

GOLDBERG, Senior Circuit Judge:

In this direct appeal from convictions for various offenses flowing out of a conspiracy to import marijuana we are called upon to evaluate two evidentiary rulings. Finding that the trial court improperly admitted extrinsic evidence to attack the credibility of a defense witness, we reverse the convictions of all three appellants and remand.

I. BACKGROUND

A. Facts

In early 1980, a DEA informant, Miller, was contacted by appellant Kessler regarding a possible drug smuggling scheme. After this contact, Miller and DEA

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*Honorable Irving L. Goldberg, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

agent Martinez met Kessler in Miami at the Fontainebleau Hotel, on April 3, 1980. Kessler described the scheme as involving flying marijuana from Haiti and Colombia to the United States in a DC-6. Kessler wanted agent Martinez to be the pilot. Nothing was settled at that meeting, so another meeting was scheduled the next day.

On April 4, 1980, agent Martinez again met appellant Kessler. Kessler introduced Martinez to appellant DiMatteo and some other conspirators. Bobby Caldevilla was also present for part of that meeting. At this meeting definite plans were made for the importation of marijuana. Subsequently, agent Martinez was introduced to appellant Suggs, who was to participate in unloading the plan when it landed in the United States. Suggs showed agent Martinez the proposed landing site. The marijuana was flown to the United States on April 20, 1980. After the marijuana was unloaded into trucks, DEA agents seized it. Subsequently the conspirators were arrested.

B. Procedure Below

Some of the conspirators were tried separately, and their convictions have been affirmed by this Court. *United States* v. *Varella*, 692 F.2d 1352 (11th Cir.1982). Caldevilla was indicted, but after a *James* hearing, *United States* v. *James*, 590 F.2d 575 (5th Cir.) (en banc), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), the trial court ordered that the charges against him be dismissed. Appellants DiMatteo, Kessler, and Suggs were tried before a jury and convicted of various counts flowing out of the conspiracy.

DiMatteo and Kessler tried to show that they had been attempting to establish legitimate business ventures. DiMatteo wanted to introduce testimony by Caldevilla that Caldevilla heard no discussion of marijuana at the April 4 meeting. After extensive voir dire the trial court ruled that if Caldevilla so testified, the

government could cross examine Caldevilla regarding subsequent drug related conversations with agent Martinez. The court further ruled that if Caldevilla asserted his fifth amendment rights against self-incrimination, it would allow Martinez to testify regarding the subsequent conversations. Given these rulings by the trial court on the voir dire, DiMatteo decided not to call Caldevilla as a witness. Both Kessler and Suggs joined DiMatteo's objection to the trial court's rulings on these matters.

Kessler attempted to show that his interest was in legitimate business by introducing a recording of a phone call to informant Miller made in the fall of 1980. The government in turn introduced duplicates of other recordings made by informant Miller in which Kessler discussed the drug transaction, rather than a legitimate business deal.

Suggs' court appointed counsel attempted to show that Suggs was not an active participant in the conspiracy. Suggs had a very distinctive raspy voice due to surgery on his larnyx. Suggs' counsel tried to attack Martinez' credibility by showing that Martinez had never noticed Suggs' distinctive voice. During the trial Suggs became unhappy with his court appointed counsel and after trial he requested a new trial because his representation was inadequate. The trial court denied the motion.

C. Issues on Appeal

We are presented with three issues on this appeal. DiMatteo argues that the trial court's ruling that agent Martinez could testify regarding subsequent drug related conversations with Caldevilla violated the extrinsic evidence rule of Fed.R.Evid. 608(b). Kessler and Suggs join in this argument. Kessler claims that the court improperly admitted duplicate recordings of his telephone conversations with informant Miller. Suggs claims that his counsel did not adequately represent him. We find that the extrinsic evidence claim has merit, but that the

duplicate tape claim does not. Because of our disposition of the first argument, we need not address Suggs' inadequate representation claim.

II. CALDEVILLA'S CHARADE

A. Voir Dire

When DiMatteo's counsel prepared to call Caldevilla to testify, the government apprised the court of the possibility that its cross-examination might cause Caldevilla to assert his fifth amendment right against self-incrimination. In order to avoid prejudicing the jury, the trial court decided to hold a lengthy voir dire of Caldevilla. At the voir dire Caldevilla testified on direct examination that he was present at the April 4 meeting and had heard no mention of marijuana at the meeting.

At that point the government disclosed the fact that on July 7, after the conspiracy involved in this case had terminated, Caldevilla had engaged in discussions with agent Martinez regarding an independent smuggling conspiracy. The district court initially held that the government could not inquire into the subsequent conversation. The court adjourned for the day, and the government put the evening hours to productive use. The next morning the court was persuaded by the government's new-found case law to allow both cross-examination on the July 7 meeting and extrinsic evidence if Caldevilla's answers were not forthright and forthcoming. In order to avoid the prejudice that would result from the cross-examination and extrinsic evidence, DiMatteo chose to forego Caldevilla's testimony.

B. Preservation of Error

DiMatteo and Kessler both urge before us that the trial court's rulings on the subsequent July 7 conversation was error. The government responds, first, that no one can raise the error because none of the disputed testimony was actually given, and, second, that Kessler

cannot raise the error because he disavowed Caldevilla as his witness. We treat these arguments in turn.

Though we are somewhat troubled by the hypothetical nature of the proceedings in this case, we believe error was amply preserved. The only authority brought to our attention by the parties on this point clearly holds that error is preserved when evidence is withdrawn following an anticipatory ruling by the trial court. *United States* v. *Whitehead*, 618 F.2d 523, 528 (4th Cir.1980). The government would have us force DiMatteo to attest to the courage of his convictions by suffering the prejudice of improperly admitted testimony in the faith that an appellate court would later correct the error. Seeing no merit in that position, we follow *Whitehead*. The trial court was clearly apprised of the disagreement with its ruling in the offer of proof, and that is the primary consideration in preservation of error. *See generally*, 21 C. Wright & K. Graham, *Federal Practice and Procedure* §§ 5040, 5041 (1977).

It is a bit more difficult to determine whether appellant Kessler preserved any error during the offer of proof. On the first day of the voir dire Kessler's counsel made a point of noting that DiMatteo was calling the witness, not Kessler. Transcript at 438. However, he clearly objected to the government's intention to cross-examine Caldevilla concerning the July 7 meeting: "[I]f this line of questioning is pursued by the Government, Mr. Kessler would be prejudiced by his inclusion in these meetings in July concerning this other criminal activity and I would like to note my objection on his behalf to that taking place." *Id.* On the second day of the voir dire Kessler's counsel noted the benefit to Kessler of Caldevilla's exculpatory testimony, *id.* at 482, and detailed at great length the legal ground for his objection. *Id.* at 482-87. We believe that the trial court was well aware of the disagreement with his ruling, and, thus, Kessler adequately preserved the error for ap-

peal. Finally, we note that Suggs' counsel adopted the objections of DiMatteo and Kessler. *Id.* at 487.

C. Extrinsic Evidence and Specific Contradiction

Ignoring for the moment the hypothetical nature of the proceedings before us, we shall assume the following facts: Caldevilla testified on direct examination that he heard no mention of marijuana at the April meeting and, when questioned about the July meeting, he asserted his fifth amendment rights against self-incrimination. The government then desired to introduce the testimony of agent Martinez regarding the July meeting. The question facing us is whether that introduction was permissible. Because evidence may be admissible for many purposes, Fed.R.Evid. 105, we shall consider alternative theories of admissibility.

1. Attacking Caldevilla's Credibility.—The government desired to prove that the April meeting was about marijuana, and Caldevilla testified to the contrary. Thus, the government had a strong incentive to attack Caldevilla's credibility. The government wished to introduce testimony regarding the July meeting to attack Caldevilla's credibility in testifying about the April meeting. That approach, however, runs squarely into Fed.R.Evid. 608(b), which provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility ... may not be proved by extrinsic evidence." This rule is well established in this Circuit. *See, e.g., United States* v. *Cluck,* 544 F.2d 195 (5th Cir.1976). Accordingly, the government could not introduce agent Martinez' testimony in order to attack Caldevilla's credibility.

2. Extrinsic Evidence and Specific Contradiction.—The government recognizes the shield provided by the plain words of Rule 608(b), and attempts to penetrate that barrier by invocation of the doctrine of specific contradiction. The government argues that Rule 608(b) applies solely to attacks on the overall cred-

ibility of the witness and that extrinsic evidence may be admitted to attack specific facts to which the witness testified, notwithstanding Rule 608(b). We believe that this "specific contradiction" rule is not as broad as the government would have us believe and can be stated in simple terms—evidence may be admitted to prove or disprove material facts in a case, even though a previous witness has testified to the contrary. To understand the need for so obvious a rule, we must first explain a peculiar potential reading of Rule 608(b).

Credibility can be attacked in two basic ways. First, opposing counsel can show a witness to be generally unbelievable; second, counsel can show that some particular testimony of the witness was unbelievable, for example, by introducing controverting testimony. This second proposition makes possible a slightly bizarre reading of Rule 608(b). Suppose a prosecution witness testifies that the defendant committed the crime. If the defendant sought to introduce testimony to the effect that she did not commit the crime, the prosecution could object on the basis of Rule 608(b)—the defendant seeks to introduce extrinsic (exculpatory) evidence to attack the credibility of the prosecution's (inculpatory) testimony.

Fed.R.Evid. 105 shows us the way to avoid this absurd result. Evidence inadmissible for one purpose may be admissible for another purpose. In the example just given, the evidence inadmissible for attacking the credibility of the prosecution's witness may, of course, be admissible to show that the defendant did not commit the crime. This rather simple and obvious proposition has been confused by its elevation to the lofty status of the doctrine of specific contradiction. Extrinsic evidence introduced exclusively in order to attack the credibility of a witness is barred by Rule 608(b), but evidence that is admissible for other purposes is still admissible for other purposes even though it may by im-

plication reduce the credibility of another witness. Thus, in *United States* v. *Opager*, 589 F.2d 799 (5th Cir.1979), we said:

> Similarly, we believe that Rule 608(b) should not stand as a bar to the admission of evidence introduced to contradict, and which the jury might find disproves, a witness' testimony *as to a material issue of the case.*
>
> The fact that the business records might have the incidental effect of proving Posner a liar does not affect their admissibility as relevant evidence. In countless cases where facts are in dispute, one party may be able overwhelmingly to disprove the testimony of a prior witness. *To exclude under Rule 608(b) the latter otherwise relevant evidence,* as the government would have us do today, *would completely divorce legal proceedings from the truth seeking process.*

Id. at 803 (emphasis added). *See also* J. Wigmore, *Evidence* § 1003, at 961 (J. Chadbourn rev. 1970.)[1]

---

[1] The government cites two pre-Federal Rules of Evidence cases that it believes illustrates its view of the specific contradiction rule. In fact, as we explained in *United States* v. *Holman*, 680 F.2d 1340, 1353-54 (11th Cir.1982), the two cases are not quite so broad. *Jackson* v. *United States*, 311 F.2d 686, 689-90 (5th Cir.1963), held merely that when a criminal defendant presents himself or herself as a law-abiding citizen not likely to have committed a crime, the prosecution may introduce extrinsic evidence of specific bad acts to show lack of good character. "It must be remembered that the defendant himself injected this idea that as a former violator he had now reformed and neither needed, used, or handled narcotics." *Id.* at 689. *United States* v. *Gonzalez*, 491 F.2d 1202, 1204 (5th Cir.1974), though using unfortunately loose language, is to the same effect—Gonzalez alleged a blameless past not involving narcotics and the government was allowed to introduce evidence to the contrary. *Gonzalez*, in fact, relied upon *Jackson* for that proposition. This rule is now codified in Fed.R.Evid. 404(a)(1).

In the case before us, we need not consider whether the evidence would be independently admissible, because the government, in accord with its understanding of the principle of specific contradiction, has never argued that Martinez' testimony was offered for any purpose other than to attack Caldevilla's credibility. *See, e.g.*, Transcript at 435 ("THE COURT: You are, in effect, trying to bring in subsequent similar or extrinsic acts? MR. McMASTER [prosecuting attorney]: Not against the defendant, Judge. Against a witness and it goes to his credibility...."); *id.* at 478 ("I would bring Agent Martinez in to directly impeach his credibility, to prove on the stand that Mr. Caldevilla is a liar."). In fact, the government specifically disavowed any other ground for admission:

> It's the Government's position that [the defendants] thereby open the door for the admission of the evidence impeaching or what the Government submits, at least, is going to be impeaching the witness' testimony.
>
> If it's material, Judge, *it would only come in for that one particular purpose* and I should be allowed to use whatever evidence I have to show that Mr. Caldevilla is untruthful.

Id. at 491 (emphasis added). Though the trial court made passing reference to other grounds for admissibility, *id.* at 494-95, it is clear that the sole ultimate basis for admitting the evidence was to attack Caldevilla's credibility. The trial judge noted that he "would instruct the jury that the testimony with regard to this matter is admitted and limited to the issue of the credibility of the witness and is not addressed to the direct guilt or innocence of any defendant...." *Id.* at 496.

Given the fact that the extrinsic evidence was admitted solely to attack the credibility of the witness, and the fact that Fed.R.Evid. 608(b) specifically prohibits such a use of extrinsic evidence, the trial court's ruling was in error.

D. Harmless Error

The government next argues that any error in the trial court's ruling would be harmless. The government's position is that if Caldevilla declined to answer questions on cross-examination because of his fifth amendment rights and the government was unable to rebut with extrinsic evidence, the trial court would have been within its discretion in striking Caldevilla's testimony on direct examination. *See, e.g., United States* v. *Diecidue*, 603 F.2d 535, 552 (5th Cir.1979), *cert. denied*, 445 U.S. 946, 100 S.Ct. 1345, 63 L.Ed.2d 781 (1980).[2] Thus, the situation would be the same as it is now—no testimony by Caldevilla, no rebuttal by Martinez.

The problem with this argument is that the government claims only that it was within the trial court's *discretion* to strike the testimony. We will not hold the error to be harmless based on an assumption about how the trial court would exercise its discretion. This case involves enough hypothetical scenarios without our adding to the tale. Given that the error is not harmless and that all defendants objected, we must reverse all the convictions and remand for a new trial.

---

[2] We do not hold in fact that it would be proper for the trial court to strike Caldevilla's direct testimony under those circumstances. First "[i]t is generally only where the witness refuses to answer on 'direct' as opposed to 'collateral' matters that his direct testimony must be excised." *Diecidue*, *supra*, 603 F.2d at 552. *Diecidue* itself held that an attack on credibility was collateral. *Id.* Second, *Diecidue* dealt with a prosecution witness; the calculus may change with a defense witness because of the defendant's right to present a defense. Again, we do not pass on the issue one way or the other, but merely note that it is not a foregone conclusion that striking Caldevilla's testimony would be permissible.

III. ADMISSION OF DUPLICATE TAPES

Defendant Kessler raises a second evidentiary argument, and because the same problem is likely to arise on retrial, we address the issue briefly. Kessler made several phone calls during the pendency of the conspiracy to informant Miller. Unbeknownst to Kessler, Miller recorded many of those calls and turned the recordings over to DEA agents. The DEA made copies of these recordings and the government introduced the copies into evidence at trial. Kessler objected to the admission of the copies because "[t]hey are not originals and they have not been in custody of the DEA exclusively or in such a manner secured so that we know these are the tapes and they are not the tapes originally made." Transcript at 549.

We construe this as raising two grounds for the objection. First, it questions the accuracy of the copies, and second, it objects simply to the introduction of duplicates rather than the originals. "A 'duplicate' is a counterpart produced ... by mechanical or electronic re-recording, ... or by other equivalent techniques which accurately reproduces the original." Fed.R.Evid. 1001(a). Thus, a duplicate must be an accurate reproduction of the original recording. Here Miller testified that the duplicates were "exact recordings of conversations that were on the original tapes." Transcript at 547. Thus, the government properly established that the tapes introduced were duplicates of the original recordings.

Under the Federal Rules of Evidence, "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Fed.R.Evid. 1003. The burden of raising an issue as to the authenticity of the original is on the party opposing admission. *United States* v. *Georgalis*, 631 F.2d 1199, 1205 (5th

Cir.1980). We do not believe that Kessler ever met his burden of raising a genuine issue as to the authenticity of the originals. Furthermore, even if he had done so, Miller's testimony that the duplicates accurately reproduced the conversations would have been a sufficient response. "If there is independent evidence of the accuracy of the tape recordings admitted at trial, we shall be extremely reluctant to disturb the trial court's decision even though at the time that decision was made the government had not carried its particularized burden of going forward." *United States* v. *Biggins*, 551 F.2d 64, 67 (5th Cir.1977). Accordingly, we find no error in the admission of the duplicate tapes.

CONCLUSION

The district court and the government, fully recognizing the possible consequences of error, were in agreement that the government could introduce extrinsic evidence to attack the credibility of the proffered testimony of a defense witness. That is precisely what Fed.R.Evid. 608(b) prohibits, unless there are independent grounds for admitting the extrinsic evidence. Accordingly, we must reverse the convictions of all three defendants and remand for a new trial.[3]

REVERSED and REMANDED.

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[3] Appellant Suggs also requested a new trial on the ground that his court-appointed counsel was inadequate. Because we reverse on other grounds, we need not address that argument.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6001
D.C. Docket No. 80-317-CR-SMA

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RICHARD DIMATTEO, MORRIS KESSLER,
JAMES SUGGS, DEFENDANTS-APPELLANTS.

Appeals from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and GOLDBERG*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court.

OCTOBER 11, 1983

---

*Honorable Irving L. Goldberg, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-6001

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

RICHARD DIMATTEO, MORRIS KESSLER,
AND JAMES SUGGS, DEFENDANTS-APPELLANTS.

On Appeal from the United States District Court
For the Southern District of Florida

[Dec. 19, 1983]

ON PETITION FOR REHEARING

Before GODBOLD, Chief Judge, ANDERSON, Circuit Judge, and GOLDBERG*, Senior Circuit Judge

PER CURIAM:

The petition for rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for rehearing en banc is DENIED.

ENTERED FOR THE COURT

/S/ GODBOLD
Chief Judge

---

*Honorable Irving L. Goldberg, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

ORIGINAL

(3)

NO. 83 - 1554

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

UNITED STATES OF AMERICA, PETITIONER,
v.
MORRIS KESSLER, et al, RESPONDENTS.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

JAY GREGORY HORLICK
ATTORNEY FOR RESPONDENT
MORRIS KESSLER

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TO:HON. REX E. LEE
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON,D.C. 20530

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NO. 83 - 1554

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER,

v.

MORRIS KESSLER, et al, RESPONDENTS.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46 of the Rules of this court, respondent, Morris Kessler, asks leave to file the attached response to the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed in forma pauperis. Respondent, Morris Kessler, was granted similiar relief by the District Court for the Southern District of Florida (ARONOVITZ, J.), and by Judge Aronovitz for purposes of appeal in the Eleventh Circuit Court of Appeals. On both occassions the undersigned was appointed pursuant to the Criminal Justice Act of 1964, as amended.

Dated: April 5, 1984

Yours etc.,

JAY GREGORY HORLICK
Attorney for Morris Kessler

16 Court Street
Brooklyn, New York 11241
(212) 875-3222

JAY GREGORY HORLICK

NO. 83 - 1554

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER,

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WASHINGTON, D.C. 20530

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SUMMARY OF ARGUMENT

This case was properly decided on the issues presented to the United States Court of Appeals for the Eleventh Circuit.

The motion in limine was not made by or on behalf of any of the defendants on trial, but was the result of an application by the Assistant United States Attorney.(Tr 424-440)

The issue presented in Luce v. United States (petition for cert. pending,No. 83-912) is totally unlike any issue in the instant case. The Luce case concerns a defendant's motion to restrict cross-examination about the defendant's own prior criminal conviction (Fed. R. Evid. Rule 609(a)), while the instant case concerns the use of extrinsic evidence of the subsequent acts of a defense witness (Fed. R. Evid. Rule 608(b)).

ARGUMENT

The Luce case, supra, is relied upon by the petitioner in an attempt to have this court accept two separate and distinct issues under one title. Luce was the defendant who did in fact make application to the court to restrict cross-examination of himself with regard to his prior criminal convictions. Federal Rules of Evidence Rule 609(a) specifically deals with that issue.

In the instant case a defense witness is the focus of attention. After hearing that the defense would call Robert Caldevilla to testify that no incriminating conversations took place

at the April 4 Cricket Club meeting (attended by respondent Kessler), the government explained to the court that it would examine Caldevilla concerning subsequent conversations with Agent Martinez about marijuana importation. Anticipating Caldevilla's denials the government intended to recall Martinez as a rebuttal witness to prove that the conversations had taken place and thus affecting the credibility of the witness. The government sought the ruling in advance, but seeks here to claim that the defendants are appealing an "...adverse ruling on his motion in limine..."(petition page 8). The use of Agent Martinez in rebuttal to prove the subsequent acts and thereby attack Caldevilla's credibility was clearly in violation of Federal Rules of Evidence Rule 608(b). The violation of Rule 608(b) was the basis upon which the Eleventh Circuit Court of Appeals properly reversed this conviction.

The petitioner further seeks review because the defense witness did not testify after the court made its ruling. The petitioner claims that "...a holding that the District Court's preliminary ruling is reviewable may have no other consequence than to discourage the District Courts from giving such rulings."(petition page 10)

In New Jersey v. Portash 440 U.S. 450, at 454,455 this court clearly held:

> "The State contends that the issue presented by Portash is abstract and hypothetical because he did not, in fact, become a witness. Portash could have taken the stand, testified, objected to the prosecution's

> use of the immunized testimony to impeach him, and appealed any subsequent conviction. Absent that, the State would have us hold that the constitutional question was not and is not presented. This argument must be rejected. First, it is clear that although the trial judge was concerned about making a ruling before specific questions were asked, he did rule on the merits...
>
> Second, the New Jersey appellate court necessarily concluded that the federal constitutional question had been properly presented, because it ruled in Portash's favor on the merits."

The decision in Portash, supra, is clearly conclusive on the question now offered by the petitioner. Given a proper record on appeal there can be no reason to exclude appellate review of rulings in limine, regardless of whether the witness ultimately takes the witness stand and testifies.

The remaining arguments advanced by the petitioner are specious at best. The trial court's use of a "dry run" gave all parties and the court a full and complete understanding of the testimony and the legal position of the witness. The "dry run" did in fact provide the concrete factual basis upon which the appellate court could act.

By his presence at the April 4 Cricket Club meeting Morris Kessler stood to gain immeasurably from the testimony of Caldevilla. Trial tactics dictated that Kessler remain separate and apart from the interest of respondent DiMatteo

and to be able to argue against admission of the rebuttal testimony on grounds which had nothing to do with either of his codefendants. The rebuttal testimony as proffered would have placed Morris Kessler at the scene of and as a participant in the subsequent criminal conversation, which would have represented evidence of an unchraged criminal act. Since DiMatteo called the witness Kessler could move to exclude any reference to his presence at the subsequent conversations. Any fair reading of the trial record will easily demonstrate that Caldevilla's testimony was equally relevant and vital to the defense of both Kessler and DiMatteo with respect to that one meeting.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

JAY GREGORY HORLICK
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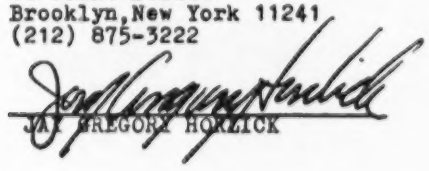

JAY GREGORY HORLICK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 5,1984 a true and correct copy of the foregoing papers were mailed to:

HON. REX E. LEE
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JAY GREGORY HORLICK
Attorney for Respondent Kessler